Editor's note: 82 IBLA 316

ATLANTIC RICHFIELD COMPANY

IBLA 75-185 Decided June 30, 1975

Appeal from the decision (GS-56-O&G) of Director, Geological Survey, affirming the determination of the Oil and Gas Supervisor requiring the payment of prejudgment interest on royalties.

Affirmed.

1. Contracts: Disputes and Remedies: Damages: Measurement -- Oil and Gas Leases: Royalties

   Even where statute, regulation, and the oil and gas lease itself do not specifically provide for the payment of prejudgment interest on royalties owed to the United States, such interest may be imposed by the United States; equity principles may authorize such imposition.

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A charge for such interest may be imposed despite delays in processing the debtor's appeals, where the debtor assertedly relied upon an earlier Departmental decision which, only when taken out of context, would tend to support the debtor's posture.

2. Contracts: Disputes and Remedies: Damages: Generally -- Contracts: Disputes and Remedies: Jurisdiction -- Geological Survey -- Oil and Gas Leases: Royalties

An Oil and Gas Supervisor of the Geological Survey has authority to demand prejudgment interest based upon the failure of an oil and gas lessee to pay timely royalties owed to the Government, despite the fact that the Supervisor is an employee of the Executive Branch.

3. Appeals -- Geological Survey -- Oil and Gas Leases: Royalties -- Oil and Gas Leases: Suspensions

Where an oil and gas lessee appeals from a decision of an Oil and Gas Supervisor's

determination that additional royalties are due to the Government, and simultaneously files a request for suspension of the ruling, which is granted by the Geological Survey "until further notice," prejudgment interest continues to accrue during the period of the suspension. This conclusion is premised on the doctrine that interest is compensation for delay in payment.

4. Courts -- Geological Survey -- Oil and Gas Leases: Generally -- Oil and Gas Leases: Royalties

A demand by the Geological Survey for prejudgment interest for delayed payment of additional royalties owed to the Government is not necessarily unenforceable in the courts because it was not asserted as a counterclaim under Rule 13(a) of the Federal Rules of Civil Procedure.

APPEARANCES: Robert A. Dick, Esq., John P. Akolt, Jr., Esq., Rex Short, Esq., and Hunter L. Johnson, Jr., Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Atlantic Richfield Company (appellant) has appealed from the decision of the Director, Geological Survey (Director), dated September 3, 1974, which affirmed the determination 1/ of the Regional Oil and Gas Supervisor (Supervisor), Casper,

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1/ The determination of the Regional Oil and Gas Supervisor, in pertinent portions is set forth below:

"We have determined the amount of additional royalties which had accrued as of March 31, 1971, on each of your Lost Soldier oil and gas leases, including those which were the subject of the litigation and four leases which, although not specifically made subject to that litigation, come within the same category for purposes of royalty settlement. Upon your adjustment of royalty accounting procedures, no additional royalties accrued in this regard after March 31, 1971. Our findings as to the amount of additional royalties due to the United States are as follows:

Cheyenne 029630(a)	$2,247,373.03
065546	2,474,587.83
063724	667.95
029630(b)	242.98
065920	381.67
070341	73.88
078819	2.74
Total	$4,723,330.08

We find that the total amount of money due with interest to the United States on account of those additional royalties, which had not been paid when due, is $6,864,456.41. That amount includes additional royalties due, together with interest on the outstanding balance, which has been computed on an annual basis (on a monthly basis since November 1970) at the prevailing prime interest rate for each period. Interest on all amounts due as of October 31, 1970, has been computed beginning with the annual interest on the additional royalties that had accrued as of September 30, 1961, which was the royalty balance requested in our letter to your predecessor company, dated November 22, 1961, and has been computed on an annual balance of royalties due, including the accrual of additional royalties for each year or part year. That interest has been computed through March 22, 1971, the date on which the Geological Survey received Atlantic Richfield Company's tender of its check in the amount of the accrued royalties for which settlement had not been made. Interest on additional royalties which accrued during the period from November 1, 1970, to March 31, 1971, has been computed on the

Wyoming, dated December 29, 1971, requiring appellant to pay to the United States additional royalties in the amount of $4,723,330.08, which together with the prejudgment interest demanded, aggregated $6,864,456.41. The leases for which additional payments were demanded are: Cheyenne 029630(a), 029630(b), 063724, 065546, 065920, 070341, and 078819, all covering lands in the Lost Soldier Field, Wyoming. Appellant asserts that the additional royalties have been paid to the Government. Therefore, only the interest is at issue.

The sequence of events is succinctly set forth in appellant's brief as follows:

> (a) Oil and Gas Supervisor's letter dated November 22, 1961, recomputing and adjusting royalties on production from the Madison and Cambrian Zones underlying Cheyenne lease 029630 (a) and the Cheyenne lease 065546 (lands located in the Lost Soldier Field, Wyoming).
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> (b) Sinclair Oil and Gas Company (Sinclair) predecessor of Atlantic Richfield Company (Arco) appealed the Supervisor's royalty computation to the Director, filing its final appeal documents on or about January 24, 1962.

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fn. 1 (continued)
same basis through December 1971. The prime interest rates prevailing during all periods are taken from a table secured from the Denver Branch of the Federal Reserve Bank. Where the rate changed within a calendar year, a weighted average annual rate was employed.

"Your check in the amount mentioned above ($6,864,456.41) should be made payable to the order of the United States Geological Survey, and sent to P.O. Box 2859, Casper, Wyoming 82601. Should you have any questions concerning the amount we have determined to be due to the United States, or concerning our method of computation, we shall be happy to discuss the matter with you."

(c) On July 29, 1966, the Director, by Decision GS-37-O&G, affirmed the Supervisor's computation of additional royalty.

(d) Sinclair appealed the Director's aforesaid Decision GS-37-O&G to the Secretary, whose Decision (A-30709-75 I.D. 155 (1968)) affirming the Director's Decision was issued June 20, 1968.

(e) Sinclair, in October 1968, instituted an action in The United States District Court for the District of Wyoming (No. 5277 - Civil) in which it sought judicial relief from the various departmental Decisions.

(f) On August 22, 1969, in the above referred to action, Judge Ewing T. Kerr granted Defendant's Motion for Summary Judgment which, in effect, was an affirmation of prior departmental Decisions.

(g) The aforesaid District Court Decision was affirmed by The United States Court of Appeals, Tenth Circuit, (decision dated October 13, 1970) Atlantic Richfield Company, Walter J. Hickel, Secretary of the Interior, et al. 432 F.2d 587 (10th Cir. 1970).

(h) Oil and Gas Supervisor's letter dated February 17, 1971, to Arco computing additional royalties, payable as of October 31, 1970 ($4,652,873.58).

(i) Arco's letter of March 18, 1971, to Mr. C. J. Curtis, Geological Survey, U.S. Department of the Interior, P.O. Box 2859, Casper, Wyoming 82601, enclosing a check payable to United States Geological Survey in the amount of $4,652,873.58 in payment of recomputed additional royalties as of October 31, 1970.

(j) Regional Petroleum Accountant's letter dated March 23, 1971, to Arco returning the March 18, 1971, tendered payment, with instructions to withhold further payment until formal billing received.

(k) Oil and Gas Supervisor's letter dated December 29, 1971, to Arco constituting formal billing of the recomputed royalties as of March 31, 1971, and the initial demand for interest in the amount of $2,141,126.33, computed at prime interest rates through December 1971.

The controversy as to the propriety of additional rentals had its genesis in a letter from the Supervisor to appellant's predecessor in interest, Sinclair Oil and Gas Company (Sinclair), dated November 22, 1961. That letter advised Sinclair that the Supervisor had been instructed to recompute the royalties on production for the period of April 1, 1948, to September 30, 1961. The recomputation showed that Sinclair owed the sum of $3,209,763.90 in additional royalty payments. See Sinclair Oil & Gas Co., 75 I.D. 155, 157 (1968). We now turn to consideration of appellant's statement of reasons for its appeal to this Board.

[1] Appellant asserts that, although the Director conceded that no statute or contract authorized the Supervisor to demand interest, the Director erred in determining that equity principles justified the Supervisor's demand for interest. Appellant further asserts that it would be "a miscarriage of justice" to demand interest in view of the fact that appellant and Sinclair had been seeking administrative appellate and judicial construction of the Mineral Leasing Act on an issue which the Department itself had recognized in Richfield Oil Corp., 62 I.D. 269, 273 (1955), 2/ as "susceptible"

2/ The issue in Richfield is described at 62 I.D. 272-74 as follows:

"In support of its contention that production from the zones here involved is subject to the 12 1/2 percent royalty rate under item (1) of section 12, the appellant asserts that although these zones are within the same horizontal limits as are zones which are known to have been productive on August 8, 1946 (the `Old upper' and `Old lower' zones referred to in the Acting Director's determination), the zones here under consideration are situated below the vertical level of the productive limits of the Old upper and Old lower zones

of the interpretation advanced by Richfield. Moreover, appellant asserts that the Director erred in determining that equity principles justified the Supervisor's demand for interest. In this connection,

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fn. 2 (continued)
and are therefore entitled to the flat 12 1/2 percent royalty rate as provided in item (1) of section 12. The appellant contends that the Acting Director's failure to grant the 12 1/2 percent royalty rate as to the zones involved in this appeal indicates that the statutory phrase `productive limits of any oil or gas deposit' in item (1) of section 12 was construed by the Acting Director of the Geological Survey to mean `horizontal productive limits of any oil or gas deposit.' In other words, the appellant asserts that the Acting Director has in effect outlined on the surface of the ground the horizontal limits of the Old upper and Old lower zones and has taken the position that any oil and gas deposit lying within those horizontal limits must be considered to be within the productive limits of the Old upper and Old lower zones even though the deposit is in an entirely separate zone lying either above or below the Old upper and the Old lower zones and not coming within the vertical productive limits of these two zones.

"The issue on this appeal therefore is whether the `horizontal limits' interpretation apparently followed by the Geological Survey or the `vertical limits' interpretation contended for by the appellant is correct. "The language of item (1) of section 12 is not too clear. It grants the flat 12 1/2 percent royalty rate to production from

> * * * such leases, or such part of the lands subject thereto, and the deposits underlying the same, as are not believed to be within the productive limits of any oil or gas deposit, as such productive limits are found by the Secretary to exist on the effective date of this Act. * * *

Viewed by itself, this language is possibly susceptible of the interpretation advanced by the appellant.

"On the other hand, particularly when viewed as against the language employed in items (2) and (3) of the same section, item (1) is more reasonably construed as the Acting Director has construed it. Both items (2) and (3) grant the flat 12 1/2 percent royalty rate to `any production * * * from an oil or gas deposit * * * which is determined by the Secretary to be a new deposit.' This language plainly shows that in making a determination under item (2) or (3), the Secretary is to act only upon the basis of `deposits.' That is, in acting upon a request under either item (2) or (3) for a determination that the flat 12 1/2 percent royalty rate be granted to production from a certain deposit, the Secretary determines only

appellant points to the four and one-half years it took for the Director to decide its appeal and the 21 months which elapsed between the time of perfecting its appeal to the Department and

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fn. 2 (continued)
whether the deposit in question is a new deposit separate and distinct from any other deposit previously discovered. It necessarily follows that if the deposit in question is vertically separated from an existing deposit, it comes within item (2) or (3) regardless of whether it falls within vertical extensions of the horizontal limits of the existing deposit.

"The language of item (1) is distinctly different. It does not extend the flat 12 1/2 percent royalty rate to production from a `deposit'; it extends the flat royalty rate to production from `such leases, or such part of the lands subject thereto, and the deposits underlying the same, as are not believed to be within the productive limits of any oil or gas deposit' [Italics supplied], as such limits existed on August 8, 1946. Moreover, it is to be noted that item (1) says `such leases, or such part of the lands subject thereto, and the deposits underlying the same, as are not believed,' etc. [Italics supplied.] It does not say `such deposits.' The flat 12 1/2 percent royalty is to be extended only to such leased land as is not within the productive limits of an existing deposit, and not to such deposits as are not within the productive limits of an existing deposit. Accordingly, it seems plain that the Secretary is required to determine only whether the leased land, or part of it, lies within the productive limits of a deposit in existence on August 8, 1946. This clearly conveys the idea that the Secretary is only required to determine whether the leased land lies within the horizontal limits of any existing deposit. This interpretation is incorporated in the departmental regulation quoted earlier which was adopted shortly after the enactment of the act of August 8, 1946 (see 43 CFR, 1946 ed., 192.82(a)(3)). I refer to the provision that the flat 12 1/2 percent royalty rate shall apply to production from `(i) Land determined by the Director, Geological Survey, not to be within the productive limits of any oil or gas deposit on August 8, 1946.' [Italics supplied]

"The inclusion in item (1) of the phrase `and the deposits underlying it' also bears out this conclusion. That is, item (1) seems to say that only where the leased land and all the deposits underlying it are not within the productive limits of a deposit found to exist on August 8, 1946, will the lessee be entitled to the flat royalty rate. This negates the idea that item (1) applies to leased land where one or more of the deposits underlying the land have been found to be in existence on August 8, 1946. If Congress had intended that meaning for item (1), it would seem that Congress would have simply followed the language used in items (2) and (3); that is, item (1) would have been worded as follows:

the rendition of the Department's decision. Appellant also points to the necessary time consumed in getting a judicial determination and suggests that Board of County Commissioners v. United States, 3/ 308 U.S. 343 (1939), is dispositive of the basic issue.

Appellant's arguments implicitly recognize that even in the absence of statutory or contractual authority, interest may be imposed where principles of equity warrant such imposition. In other words, the issue whether interest is properly chargeable in the case at bar turns upon a determination whether such charge would be equitable. We look at the totality of the circumstances to ascertain whether they warrant the imposition of prejudgment interest.

While it is true that in Richfield Oil Corp., supra at 273, the Department stated that "viewed by itself, this language is possibly susceptible of the interpretation advanced by the appellant" (Italics supplied), the Department discussed in extenso the cogent reasons which impelled a contrary result. Thus we have an authoritative

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fn. 2 (continued)

> [The flat royalty rate shall extend to] (1) any production on a lease from an oil or gas deposit which is not believed to be within the productive limits of any oil or gas deposit, as such productive limits are found by the Secretary to exist on the effective date of this Act.

"Although the legislative history of section 12 is rather inconclusive, it lends support to the `horizontal limits' interpretation."

3/ Referred to in appellant's brief as Jackson County v. United States.

and definitive opinion on the issue in Richfield, limned by the highest legal officer of the Department in 1955. Appellant's purported reliance on a phrase, taken out of context, and negated by a subsequent articulate and detailed discussion, is a weak reed on which to claim reliance. This is particularly true in the light of the fact that demand for the additional royalties was made to Sinclair (appellant's predecessor in interest) on November 22, 1961 -- some six and one-half years after the issuance of Richfield.

Appellant's posture that the time consumed in obtaining appellate administrative decisions and court review makes inequitable the demand for prejudgment interest overlooks a cogent consideration. Sinclair could have paid promptly the money for additional royalties demanded by the Supervisor on November 22, 1961, accompanied by a protest against such imposition. It chose not to do so, despite the clearly enunciated holdings in Richfield in 1955. Thus it appears that appellant (and its predecessor in interest) chose to utilize the funds rather than pay them to the United States, based on the hope that the reasoned administrative interpretation of 30 U.S.C. § 226(c) (1946) could be successfully challenged. It seems equitable that the United States should be recompensed for the loss of the use of the funds due it. 4/

4/ 4 CFR 102.10 states in part that "Prejudgment interest should not be demanded or collected on civil penalty and forfeiture claims unless the statute under which the claim arises authorizes the collection of such interest." The interest sought in the case at bar is sought simply to recompense the United States for the use of funds due it.

Appellant asserts that Board of County Commissioners v. United States, supra, is dispositive of the threshold issue in its favor. That case involved the following facts: an Indian allotment, by treaty stipulation and provisions of a trust patent issued under the General Allotment Act, was exempt from taxation so long as the United States should hold it in trust. Over the Indian's objection, the Secretary of the Interior issued to the Indian a patent in fee simple which, later after long delay, the Secretary canceled by authority of an Act of Congress. In the meantime the fee patent had been registered in the county and, the county authorities in reliance upon it, had collected taxes upon the land. Thereafter, the United States in an action on behalf of the Indian recovered a judgment against the county for the amount of the tax payments with interest.

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fn. 4 (continued)

That regulation, however, also provides, "In cases in which prejudgment interest is not mandated by statute, contract or regulation, the agency may forego the collection of prejudgment interest as an inducement to voluntary payment." (Italics supplied.) Thus the regulations of the General Accounting Office implicitly recognize that prejudgment interest may be collected in the discretion of the federal agency to which the debt is owed, with certain exceptions not pertinent in the case at bar.

Regulations adopted pursuant to, and conforming with, proper authority have the force and effect of law. See Frank Allison, 3 IBLA 317 (1971). A regulation must be deemed valid unless it is shown to be "plainly and palpably inconsistent with law." Boske v. Comingore, 177 U.S. 459, 470 (1900).

The Supreme Court reversed the District Court decision, stating in part:

> Assuming, however, that the law as to interest in governmental actions based upon quasi-contractual obligations be applicable, the United States must fail here. The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable. United States v. Sanborn, 135 U.S. 271, 281; Billings v. United States, 232 U.S. 261.
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> Jackson County in all innocence acted in reliance on a fee patent given under the hand of the President of the United States. Even after Congress in 1927 authorized the Secretary of the Interior to cancel such a patent, it was not until 1935 that such cancellation was made. Here is a long, unexcused delay in the assertion of a right for which Jackson County should not be penalized. By virtue of the most authoritative semblance of legitimacy under national law, the land of M-Ko-Quah-Wah and the lands of other Indians had become part of the economy of Jackson County. For eight years after Congress had directed attention to the problem, those specially entrusted with the intricacies of Indian law did not call Jackson County's action into question. Whatever may be her unfortunate duty to restore the taxes, which she had every practical justification for collecting at the time, no claim of fairness calls upon her also to pay interest for the use of the money which she could not have known was not properly hers.

308 U.S. 343, 352-53 (1939).

In contradistinction to Jackson County, which "in all innocence acted in reliance on a fee patent given under the hand of the President of the United States," appellant's claim to bona fides is vitiated by the Richfield Departmental decision in 1955 which established

an interpretation of the Mineral Leasing Act diametrically contrary to appellant's contention. Lifting the underscored portions from "[v]iewed by itself, this language is possibly susceptible of the interpretation advanced by the appellant" hardly comports with acting "in all innocence * * * in reliance on a fee patent given under the hand of the President * * *." The case at bar is further distinguishable in that demand for interest commenced only after the debtor was apprised of his obligation. The Geological Survey is seeking interest only for the period commencing November 22, 1961, the date of its letter notifying appellant of the additional royalties due. The Geological Survey is not seeking interest for the royalties which accrued from 1948 to 1961, prior to its demand.

[2] Appellant asserts that the Supervisor is without authority "to compute interest on the additional royalties paid and to demand payment of such interest." (Statement of Reasons at 15.) Appellant's conclusion is predicated on the argument that prejudgment interest may be assessed only by the judiciary, that the Supervisor is an officer of the Executive Branch and not in the judiciary, and therefore has no authority to impose prejudgment interest. Appellant's basic assumption is that only the judiciary may impose prejudgment interest, but it points to no substantial authority for its assumption. While it is true that court suit might be necessary to enforce the payment of interest, Government personnel administering contracts

(an oil and gas lease is a contract) may make a "unilateral determination" of interest 5/ owed to the Government, subject to revision in "the discretion and judgment of the district court." Swartzbaugh Mfg. Co. v. United States, 289 F.2d 81, 84 (6th Cir. 1961).

The Director's holding that the delegation of authority to the Supervisor to make determinations of royalty liability, 30 CFR 221.3, includes authority to assess interest on delinquent royalty payments adequately disposes of appellant's contrary assertion and meets with our approbation. We note, moreover, that the Supervisor's demands for unpaid delinquent royalties and interest therein have been ratified in essence by the Director's decision of September 3, 1974.

5/ A somewhat similar case to the one at bar related to the interpretation of the Department's leases for the mining and production of potash, under the Potassium Act of February 7, 1927, 30 U.S.C. § 282 (1964). The Department's interpretation was approved in United States v. Southwest Potash Corp., 352 F.2d 113 (10th Cir. 1965), cert. denied, 383 U.S. 911 (1966), and the case was remanded to the District Court of New Mexico "with directions to proceed accordingly." The action had originated in the United States District Court for the District of New Mexico by a suit for recovery of the royalties due to the United States. After the denial of the petition by Southwest Potash for writ of certiorari by the Supreme Court, attorneys for Southwest Potash requested that the amount of royalties due the United States under the mining supervisor's determination be computed as promptly as possible. Interest was computed from the date the royalty amounts became due. See memorandum to Chief, Conservation Division, Geological Survey, from Associate Solicitor, Division of Public Lands, dated March 21, 1966. Judge Bratton of the District Court assessed interest against Southwest until April 1966, under his Judgment of Mandate and Final Judgment. United States v. Southwest Potash Corp. (D.N.M., filed Apr. 21, 1966).

[3] Appellant argues that the unconditional suspension of demand for payment of disputed additional royalties effectively suspends accrual of interest. This suspension arose from a request by Sinclair simultaneously filed on December 12, 1961, with its notice of appeal to the Director from the Supervisor's determination of November 22, 1961, that additional royalties were due to the Government. The Director's letter of December 29, 1961, suspended the Supervisor's ruling "until further notice." This suspension did one thing only -- it relieved Sinclair of the obligation to pay the $3,209,763.30 additional royalties "until further notice." In no sense did it purport to relieve Sinclair (and its successor in interest) from being liable for the interest on the money withheld from the Government since 1961. At that time, interest had not been demanded from Sinclair. Interest "is customarily allowed as compensation for delay in payment." Brooklyn Bank v. O'Neil, 324 U.S. 697, 715 (1945).

In United States v. Eastern Air Lines, Inc., 366 F.2d 316, 321 (2d Cir. 1966), the Court states:

> It is well established that a party who has had the use of disputed funds for a period of time must pay interest on that portion of the funds finally determined to belong to his adversary. E.g., United States v. Royal Indem. Co., 116 F.2d 247, 249 (2 Cir. 1940), aff'd, 313 U.S. 289, 61 S. Ct. 995, 85 L. Ed. 1361 (1941). * * *

The court went on to point out that even a tender does not necessarily stop the running of interest and discussed the relative equities of the parties.

[4] Appellant also urges that the Government's failure to assert the claim for interest by way of counterclaim in the declaratory judgment action involving the additional royalties payable on oil production from the Madison and Cambrian Zones underlying leases Cheyenne 029630(a) and Cheyenne 065546 bars recovery of interest. Appellant relies upon Rule 13(a) of the Federal Rules of Civil Procedure as the basis for its position and asserts that prejudgment interest is a "counterclaim" which must be pleaded or is considered waived.

We are not persuaded by the cases cited by appellant. None of them relates to the specific issue whether prejudgment interest, not counterclaimed in proceedings in the federal courts, is waived.

The only case we have found which is directly on point awarded prejudgment interest, even though not included in a counterclaim, Soderhamn Mach. Mfg. Co. v. Martin Bros. Container & Timber Products Corp., 415 F.2d 1058, 1064 (9th Cir. 1969).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Director is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Martin Ritvo
Administrative Judge